

**DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

SAMUEL H. HALL, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 2013-95
	)	
ELSA EMILY HALL,	)	
	)	
Defendant.	)	
	)	

ATTORNEYS:

Marie E. Thomas-Griffith, Esq.
St. Thomas, U.S.V.I.
For the plaintiff.

Samuel H. Hall, Jr., Esq.
St. Thomas, U.S.V.I.
Pro se plaintiff.

Carl A. Beckstedt, III, Esq.
St. Crois, U.S.V.I.
For the defendant.

ORDER

GÓMEZ, J.

Before the Court is the November 15, 2013 motion of Defendant Elsa Emily Hall ("Elsa Hall") to dismiss the complaint. She moves to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

On October 1, 2013, Samuel H. Hall, Jr. ("Samuel Hall") filed a complaint against Elsa Hall. On November 15, 2013, Elsa Hall filed a motion to dismiss Samuel Hall's complaint. On

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December 4, 2013, the parties agreed that Samuel Hall would have “an extension of time until December 16, 2013 in which to respond to” Elsa Hall’s motion. (ECF No. 6.) On December 16, 2013, Samuel Hall filed a response to the motion to dismiss and an amended complaint.

Given this backdrop, before the Court can rule on the pending motion to dismiss, as a threshold matter, the Court must determine whether the original complaint or the amended complaint is the operative complaint.

Federal Rule of Civil Procedure 15 governs the amendment of complaints. That rule, in relevant part, states:

(1) **Amending as a Matter of Course.** A party may amend its pleading once as a matter of course within:

(B) . . . 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) **Other Amendments.** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Fed. R. Civ. P. 15(a)(emphasis added) (“Rule 15(a)”).

Furthermore, “[w]hen a party may or must act within a specified time after service and service is made under [Federal Rule of Civil Procedure] 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire” Fed.

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R. Civ. P. 6(d). “A paper is served under [Federal Rule of Civil Procedure 5(b)(2)(E)] by . . . sending it by electronic means if the person consented in writing” Fed. R. Civ. P. 5(b)(2)(E).

This Court utilizes an electronic filing service. The Court’s Local Rules of Civil Procedure provide that “[r]egistration as a Filing User [in the Court’s electronic filing service] constitutes consent to electronic service of all documents as provided in these Rules in accordance with the Federal Rules of Civil Procedure.” LRCi 5.4(b). The “Notice of Electronic Filing that is automatically generated by the Court’s Electronic Filing System . . . constitutes service of the filed document on Filing Users.” LRCi 5.4(i)(1).

Samuel Hall filed his original complaint on October 1, 2013. Elsa Hall did not file a responsive pleading to Samuel Hall’s original complaint. Instead, she filed a “motion under Rule 12(b)” on November 15, 2013. That motion was served on Samuel Hall through the Court’s electronic filing service on the same day. Because Samuel Hall was served electronically, he was permitted to file an amended complaint as a matter of course with 24 days of receiving service of the motion—until December 9, 2013. See Rule 5(b)(2)(e), 6(d), 15(a)(1)(B). A week after that date, Samuel Hall filed his amended complaint.

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Because Samuel Hall filed his amended complaint after he was no longer permitted to amend his complaint as a matter of course, he could only file an amended complaint with either the other party's written consent or the Court's leave. See Fed. R. Civ. P. 15(a)(2). There is no record evidence that the parties agreed to extend his time to file an amended complaint. Samuel Hall also did not obtain the Court's leave to file his amended complaint. Thus his amended complaint may only be treated as operative if this Court allows it.

Presented with similar cases, this Court has acknowledged that "some courts have held that an untimely amended pleading served without judicial permission may be considered as properly introduced when leave to amend would have been granted had it been sought, and when it does not appear that any of the parties will be prejudiced by allowing the change." *Cromwell v. Int'l Union*, CIV 2007-141, 2010 WL 5175038, at *1 (D.V.I. Dec. 6, 2010)(quoting *Straub v. Desa, Indus. Inc.*, 88 F.R.D. 6, 8 (M.D.Pa.1980); see, e.g., *U.S. ex rel. Mathews v. HealthSouth Corp.*, 332 F.3d 293, 295-97 (5th Cir. 2003)(declining to deem the amended complaint properly introduced because allowing retroactive leave to amend the complaint would have prejudiced a party); *U.S., for Use & Benefit of Dorfman, v. Standard Sur. & Cas. Co. of New York*, 1 F.R.D. 239, 240 (S.D.N.Y. 1940)(deeming

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the amended complaint properly introduced); *see also* 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1484 (3d ed. 2014)). This practice is in accord with "the overall liberal amendment policies of Rule 15(a)." *Cromwell*, 2010 WL 5175038, at *1 (quoting *Straub*, 88 F.R.D. at 8).

The Court finds that Samuel Hall would have been granted leave to file his amended complaint if he had requested it. Additionally, Elsa Hall will not be substantially prejudiced. As such, the Court will grant Samuel Hall leave *nunc pro tunc* to December 16, 2013, to file the amended complaint and will treat the amended complaint as the operative complaint.

Where, as here, a defendant files a motion to dismiss and the plaintiff subsequently "fil[es] . . . [an] amended complaint[,] . . . [t]hat filing . . . render[s] moot [the] defendant['s] motion[] to dismiss." *Merritt v. Fogel*, 349 F. App'x 742, 745 (3d Cir. 2009).

The premises having been considered, it is hereby

ORDERED that Elsa Hall's motion to dismiss is **MOOT**.

S\ _____
Curtis V. Gómez
District Judge